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No. 83-473

In The
Supreme Court of the United States
October Term, 1983

FRANCIS X. OROFINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

REPLY BRIEF FOR THE PETITIONER

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Initially, a mistatement of fact contained in the Government's Brief in Opposition should be corrected. In recounting pre-trial preparation of defense counsel, the government stated:

> "Weintraub also took the deposition of several witnesses at the United States Consulate in Milan, Italy (Pet. 6). The government furnished assistance in connection with these depositions by arranging for space, equipment, and interpreters and other personnel." (Br. 6).

The witnesses deposed in Milan, Italy were government witnesses whose testimony was introduced at trial as part of the prosecution's case-in-chief. Weintraub was present solely to cross-examine those witneses. The accommodations were provided by the government for its own benefit and not as an accommodation to defense preparation.[1]

Relying in part, upon this Court's recent decision in *Morris v. Slappy*, U.S., 103 S. Ct. 1610 (1983), the government contends that the trial court did not abuse its discretion in denying petitioner's motion for a continuance.

Morris v. Slappy, however, involved issue distinct from the ir tant petition.[2] In that case, the defendant was represented by a Deputy Public Defender who vigorously prepared for trial. Six days before trial that Public Defender was hospitalized for surgery and another Public Defender, a senior trial attorney in that office, was assigned to represent him. That attorney immediately notified the defendant of the substitution, reviewed the file and investigation prepared by his predecessor, and conferred with the defendant. *Id.* at 1613.

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1. In fact, the witnesses included the former Comptroller of Cotonificid Vitosario Widemara and an Italian Receiver in Bankruptcy whose testimony involved aspects of Italian business, legal and accounting procedures.

2. This distinction was recognized by the government in *United States v. Cronic, cert. granted*, No. 82-660 (Feb. 22, 1983), a case almost identical with the instant case. In *Cronic* the government argued that its petition should not be held pending determination of *Morris v. Slappy* because the "issues presented . . . are sufficiently distinct." (Pet. 21 n. 13).

After trial commenced, Slappy complained that his lawyer did not have adequate time to prepare his defense, but the Public Defender stated: "I feel I am fully prepared. My own feeling is that a further continuance would not benefit me in presenting the case." *Id.* Later Slappy complained that the first Public Defender was his counsel and not the second. *Id.* at 1614.

In those circumstances, this Court held that it was not an abuse of discretion to deny a continuance. *Id.* at 1614-15.

Unlike *Morris v. Slappy* the instant petition involves complex litigation and a timely motion by counsel who was unable to adequately prepare to meet so broad and complex charges.

The government also contends that the responsibility for the delay in retention of counsel rests in part with the petitioner, and, therefore, he should not be heard to complain about inadequate time to prepare (Br. 8-9).

However, an analysis of the facts surrounding the retention of counsel presents other issues of constitutional dimension counseling in favor of granting certiorari.

The United States Magistrate had appointed counsel for petitioner pursuant to the Criminal Justice Act 18 U.S.C. 3006(A) (CJA). That counsel was disqualified by the trial Court because petitioner had gross income of $48,000.00 per year. Despite repeated protestations of petitioner, appearing *pro se*, that he

could not afford to retain counsel, no inquiry was made to determine petitioner's net income or whether he had sufficient assets to retain counsel in a complex multi-count prosecution involving allegations of stock fraud, mail and were fraud, sale of unregistered securities, inducing investors to travel in interstate commerce and conspiracy (Pt. 5-6).[3]

This suggests that the delay in retaining counsel resulted from petitioners' inability to raise sufficient funds and not due to unwillingness to act. More significantly, several additional issues are presented:

1) Once counsel has been appointed pursuant to the CJA, what inquiry and findings must be made before appointed counsel can be disqualified?
2) Who has the burden of proof in such proceeding?
3) Once appointed counsel has been disqualified and defendant continues to state that he cannot afford to retain counsel, what inquiry must be made?

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3. Obviously, to retain competent counsel in New York City to prepare and try a complex Federal fraud litigation involving corporations in the United States and Italy, requires a very substantial retainer. Members of the Criminal Bar do not enter cases of this magnitude based upon a client's gross income of $48,000 per year which could easily result in adjusted gross income of $20,000 per year when petitioner's office and other overhead costs are considered. In fact, this very problem plagued petitioner. As noted in the Government's Brief, on September 8, 1982 counsel who was to represent petitioner, refused to enter the case because of petitioner's inability to pay a sufficient retainer (Br. 5). Clearly, in determining whether a defendant can afford counsel, the trial Court must weigh the defendant's assets and income against the anticipated costs of trial. *Hardy v. United States*, 375 U.S. 277, 289 n. 7 (1963) (Goldberg, J., concurring); *See also United States v. Rubinstein*, 543 F.2d 951, 964 (2d Cir.), *cert. denied sub nom., Chester v. United States* and *Reynolds v. United States*, 429 U.S. 850 (1976).

4) Who has the burden of proof at that stage of the proceedings and if it falls upon the defendant must the trial Court inform a *pro se* defendant that he has such burden and afford him the opportunity to demonstrate his inability to retain counsel and lack of assets?

In the instant case no inquiry was made into petitioner's ability to retain counsel before appointed counsel was disqualified or after petitioner repeatedly stated that he could not raise sufficient funds to retain counsel. Without such inquiry, it was merely speculation that petitioner was not acting expeditiously.

The right to court appointed counsel if the defendant cannot afford to retain counsel is fundamental. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gidion v. Wainwright*, 372 U.S. 335 (1963). Before disqualifying Court appointed counsel and certainly when a defendant indicates that he cannot afford to retain counsel, the trial Court should conduct a full inquiry to determine whether a defendant has sufficient assets to retain counsel. See *United States v. Martin-Trigona*, 684 F.2d 485 (7th Cir. 1982); *United States v. Anderson*, 567 F. 2d 830, 840 (8th Cir. 1979).

Finally, the government attempted but failed to distinguish the instant case from *United States v. Cronic, cert. granted*, No. 82-660 (Feb. 2, 1983). The Government claims that unlike *Cronic*, there is no allegation by petitioner that trial counsel was inexperienced. (Br. 9 n. 5). However, inexperience of counsel was only one of five (5) factors relied upon by the Circuit Court in *Cronic*. Moreover, it appears that

Cronic was represented by two lawyers prior to and at trial, one of whom had extensive experience in criminal cases. (Pet., *United States v. Cronic* at 4 n.2).

The Government also claims that in the instant case petitioner was largely responsible for the amount of preparation time allowed to counsel (Br. 9 n.5). However, as previously discussed, this raises more issues than it purportedly resolves.

Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: New York, New York
December 7, 1983

Charles L. Weintraub